



**(1) Gany Holdings (PTC) SA (2) Asif Rangoonwala (Appellants) v Zorin Khan v Others (Respondents) [2018] UKPC 21**

*On appeals from the British Virgin Islands*

**JUSTICES:** Lord Reed, Lord Sumption, Lord Hodge, Lord Lloyd-Jones, Lord Briggs

**SUMMARY**

Alan Boyle QC, Richard Wilson QC and Zahler Bryan of Serle Court acted for the successful Respondents in this important Privy Council appeal from the BVI concerning the vesting of trust assets and challenges to the exercise of trustees' discretion under the so-called '*rule in Re Hastings-Bass*'.

In its judgment (delivered by Lord Briggs), the Privy Council clarifies the correct approach to identifying beneficial interests arising from a gratuitous transfer of property and in particular the limited role presumptions should play in modern times.

The claim was brought by discretionary beneficiaries seeking information about the extent of the trust assets after the death of the settlor. The Board has rejected the approach taken by both of the courts below and concluded that the appropriate inference from the limited evidence available is that property vested by the settlor in the corporate trustee had been transferred with the intention that these assets should be held subject to the trust, rather than (as held at first instance) for the settlor beneficially. Time-honoured presumptions such as the presumption of resulting trust should only be resorted to when there is no evidence from which a common intention as to beneficial ownership may be inferred and therefore as a last resort. There is no legal presumption that when a settlor vests assets in a trustee of a previously established trust those assets will be held subject to that trust, but gratuitous transfers of property between the settlor and the trustee of such a trust will frequently form a powerful contextual basis for a common sense inference that that was the intention of the settlor as well as the trustee.

This case also confirms that the rule in *Re Hastings-Bass* as formulated in *Pitt v. Holt* [2013] 2 AC 108 forms part of the law of the BVI. More significantly, it resolves the debate left open by the Supreme Court in *Pitt v Holt* as to whether it is necessary in order to set aside an exercise of discretion to show that the trustee 'would' have acted differently had he not committed a breach of duty or merely that he 'might' have done so. In *Pitt*, Lord Walker declined to lay down a rigid rule of either 'would' or 'might' on the grounds that to do so would inhibit the court applying the rule in *Re Hastings-Bass* from seeking the best practical solution in a variety of different factual situations. In this case involving a family trust the Privy Council has decided that the question of whether, if properly informed, the trustees (or reasonable trustees) would or might have acted differently will be relevant, but not decisive, to the court's exercise of its discretion whether to set aside the challenged disposition. There is therefore no specific separate requirement of showing that a trustee 'would' or 'might' have acted differently but for the breach of trust.

**BACKGROUND TO THE APPEALS**

The Respondents were all beneficiaries of a discretionary trust known as the ZVM Trust ("**the Trust**") established by Mohammed Aly Rangoonwala ("**MAR**") in 1982 for the benefit of his family. MAR was a very wealthy businessman, with business interests in numerous countries. MAR died intestate in June 1998, survived by his second wife, Banu, and four children including Zorin (the First Respondent and MAR's only daughter), Asif (the Second Appellant), and Khalid. The First Appellant, Gany Holdings SA ("**Gany**"), was a BVI company appointed sole trustee of the Trust by MAR in November 1993.

On MAR's death Asif, the only one of MAR's children to have worked closely with him, was sole director of Gany and succeeded his father as Appointor of the Trust. In the years following MAR's death Zorin attempted repeatedly, and unsuccessfully, to obtain information about the Trust. A number of different cases were presented by Gany, including most notably at a meeting in February 2011 at which Khalid, then sole director of Gany, informed Zorin that the Trust held assets worth more than €92m and that one-fifth of this would be used to create a sub-trust for the benefit of Zorin and her family. When Zorin raised questions following this meeting Gany stated that the entirety of the Trust had in fact been distributed by 2000.

The Respondents issued a claim in 2012, initially seeking disclosure of information on the Trust and the sub-trust. Gany swore an account stating that the Trust had only ever held the original settlement sum of US\$100 and had never made any distributions. Subsequently, Gany claimed that all the assets of the Trust had been appointed to Asif in December 1998 ("**the 1998 appointment**"), following which Asif was added to the proceedings and the Respondents claimed that the 1998 appointment should be set aside for a number of reasons, including misconception. By the time of the trial it was admitted that shares in a Hong Kong company, European Commodities Limited ("**ECL HK**"), had also been settled on the Trust.

Following a four day trial in the BVI Commercial Court, Bannister J held that the Respondents had failed to adduce evidence to falsify Gany's account limiting the Trust property to the US\$100 sum originally settled and the ECL HK shares. The judge also held that these shares had no significant value and there was no basis for setting aside the 1998 appointment.

The Court of Appeal allowed the Respondents' appeal, holding that Bannister J had been wrong to require the Respondents to prove that Gany's account did not include three additional companies. In addition to the ECL HK shares Gany held shares in three BVI companies, ECL BVI, Cedilla Investments SA and Schweizer Holdings SA ("**the three companies**"). *In re Curteis Trusts* (1872) LR 14 Eq 217 was relied on as authority for the proposition that, when a settlor of a trust subsequently vests further assets in a trustee of an existing trust, there is a presumption that those assets are to be held subject to that trust. Gany had failed to rebut that presumption. The Court of Appeal also held that in making the 1998 appointment the directors of Gany had acted on the false or mistaken belief that the Trust assets were limited to US\$100 and, therefore, Gany had acted under a misconception. The 1998 appointment was voidable and should be set aside under the rule in *Re Hastings-Bass*.

The Appellants appealed to the Privy Council. The two main issues before the Board were (i) what constituted the property of the Trust when MAR died, and (ii) whether the 1998 appointment was voidable because of a misconception on the part of Gany as to the identity and value of the trust property. Depending on the resolution of these issues, a third issue was whether Asif should be ordered to account for trust property received by him pursuant to the 1998 appointment.

## JUDGMENT

The Privy Council has decided that the appeal should be dismissed on every issue. Rejecting both the judge and the Court of Appeal's approach on the first issue, the Board reconsidered the available evidence and concluded that the three companies were settled on the Trust during MAR's lifetime. The failure of Gany's directors to appreciate that these shareholdings formed part of the Trust's property amounted to a serious breach of fiduciary duty sufficient to trigger the court's discretionary power to set

aside the 1998 appointment and the Court of Appeal correctly exercised its discretion by ordering that this appointment be set aside. Asif should be required to account for the assets he received.

*The first issue: the property of the Trust*

Neither the judge nor the Court of Appeal approached the first issue correctly. The judge was (as the Court of Appeal rightly held) wrong to conclude that there had been no evidence probative of a conclusion that the three companies were property of the Trust. The Court of Appeal was, however, wrong to decide that the issue could be resolved by reference to any legal presumption [16].

The basic principles by which equity provides for identification of beneficial interests arising from a gratuitous transfer of property are the same in the BVI as they are in England and Wales: (i) if either the transferor or the transferee makes a written (or oral) declaration as to those beneficial interests, or they do so together in an agreed form, that will generally be decisive, regardless of the subjective intentions of either of them; (ii) in default of any such declaration, the court looks for evidence from which a common intention as to beneficial ownership may be inferred (this may include evidence of statements made by either party before, at the time of or even after the relevant transfer, the parties' conduct, and the factual context in which the transfer takes place); (iii) finally, when there really is no evidence from which an inference as to common intention may properly be drawn, recourse may be had to time-honoured presumptions such as the presumption of advancement or of resulting trust. In modern times, however, these presumptions should be a last resort [17].

Gratuitous transfers of property between the settlor and the trustee of a trust previously established are only a sub-set of cases, but the existence of that relationship may (and frequently will) form a powerful contextual basis for the drawing of common sense inferences as to mutual intention [18]. Properly understood, that is what happened in *In re Curteis' Trusts* [19]-[21].

The Court of Appeal was, however, correct to conclude that an error in the judge's fact-finding on this issue was sufficient to enable the question to be re-examined on appeal. The judge had concluded that there was no evidence to show that shares in any of the three companies had been vested in Gany at a time when it was trustee of the Trust. However, there was evidence in the form of Asif's witness statement (in which Asif had stated that MAR had transferred businesses into Gany, and then given Gany to Asif, as a mechanism to give those businesses to Asif) [23]. Although Asif's evidence that MAR had used Gany to gift his businesses to Asif was self-serving, and rejected for good reason by the judge, his unchallenged evidence that these businesses were vested in Gany was not [40].

The determination of the first issue turns on making an appropriate common-sense deduction as to MAR's intention, to be derived from a review of the largely unchallenged evidence about the relevant parties' conduct at the time. MAR's intention is sufficient, because he was also the governing mind of Gany at the material time as its only director and shareholder [27]. There are only three possibilities as to MAR's intention in relation to the beneficial ownership of the three shareholdings he vested in Gany: either he intended Gany to hold those shares beneficially, he intended the shares to be held by Gany as trustee of the Trust, or he intended to retain beneficial ownership of the shares himself [42]. Following a review of the evidence before the judge, the Board concluded that there was sufficient evidence from the facts about MAR's conduct to lead to an inference that, when transferring or otherwise vesting the shares in the three companies in Gany MAR intended to do so upon the basis that Gany was to hold the shares as property of the Trust [48].

*The second issue: was the 1998 appointment voidable?*

There was no dispute about the applicable legal principles. The court's discretion to set aside a disposition in exercise of the trustee's powers on the basis of misconception depends upon it being shown that the relevant misconception amounted to, or came about as a result of, a breach of fiduciary duty. If that condition is satisfied, the court has a flexible discretion whether to set aside the challenged disposition, in the exercise of which the question whether, if properly informed, the trustees (or reasonable trustees) would or might have acted differently will be relevant, but not decisive [54]. The Board's conclusion that the Appellants fail on the first issue necessarily means that Gany's directors acted under a misconception about the extent of the trust property [55]. Gany was duty-bound to inform itself about the nature and value of the Trust assets and its failure to appreciate that the shareholdings in the three companies formed part of the Trust's property amounted to a serious breach of fiduciary duty sufficient to trigger the court's discretionary power to set aside the 1998 appointment [57]-[58].

*The third issue: Asif's duty to account*

Asif was not a bona fide purchaser of the property he received by virtue of the 1998 appointment. Until set aside, however, the 1998 appointment conferred on Asif both legal and beneficial ownership of the assets of the Trust. The effect of setting aside this appointment is to re-vest the beneficial ownership of the assets in the beneficiaries of the Trust. If Asif still holds property transferred in 1998, he must return it to the trustee. If not, he must account for what he has done with it [60].